In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1612

HARRY U. SCRUGGS, SR., and
HARRY U. SCRUGGS, JR.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. The Government's Argument Misconstrues the Wrongful Possession of Stolen Money Statute.

Petitioners respectfully pray the permission of this Court to file this brief of reply to the erroneous construction of 18 U.S.C., Section 2113(c), by the Government in its argument.

The Government concedes that persons who innocently acquire currency for value may "in some circumstances"

acquire valid title as against the victim of the theft; and then argues that Section 2113(c) simply prohibits the *possession* of such money for as long as the Government has need of the money in its investigation and prosecution of the robbery. But the statute is not so limited.

The Government's argument, as set forth in its footnote 4 on page 6 of its Brief in Opposition, implies that the summary divestiture of property rights in money acquired by a purchaser of such money for value without knowledge of its having been stolen, simply because such purchaser thereafter learns the money has previously been stolen, is permissible because only a portion of such rights is divested—that when the Government has no further use for the currency in investigating or prosecuting the robber, the currency can be returned to the owner, or he can be given its value.

But the statutory proscription is not limited to the time during which the Government has need of such currency for investigation or prosecution. The statute flatly prohibits *possessing* or *disposing* of such property at any time thereafter.

The Kelly Kar Co., if it did take the cash that had been stolen from a bank back into its possession pursuant to the judgment in the case of *Kelly Kar Co.* v. *Maryland Casualty Co.*, 142 Cal. App. 2d 263, 264-265, 298 P.2d 590, 592, would be just as guilty of violating Section 2113(c) as the petitioners were, because the statute provides no exception for possession or disposal of such money, even after the Government has no further need of the currency for prosecution.

The Government argues that petitioners might be entitled to retain the value of the money, but not the currency itself. But again, the statute makes no such distinction.

The statute prohibits disposing of "money or other thing of value" knowing same to have been taken from a bank. If the Government should take the currency and give the petitioners a bank credit equal to the value of the money, petitioners would still be guilty of violating the statute if they "disposed of" the bank credit, because they would have knowledge such "thing of value" had been stolen from a bank.

The statute, 18 U.S.C., Section 2113(c), when applied to one who has acquired currency for value without knowledge it was stolen, summarily deprives such owner of all of his rights in such currency, without any opportunity for a judicial determination of his rights in the currency, which is clearly spoliation prohibited by this Court's decision in *Chicago, B. & Q. R. Co.* v. *Chicago*, (1897) 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

Finally, we strongly disagree with the Government's assertion, in footnote 3 on page 6 of its Brief in Opposition, that petitioners did not object to the trial court's instructions that the jury could find defendants guilty even if they did not know the money was stolen when they received it. (Appendix, 264a.) Petitioners' trial counsel did object to this instruction. (Appendix, 266a, lines 6 through 9.) Thereafter, trial counsel became somewhat confused because he could not remember the point he wished to call to the court's attention, and it is not clear just what he did mean to say. (Appendix, 266a-267a.)

But even in the absence of objection, this instruction constituted such fundamental error that it should be reversed.

United States v. *Allegrucci*, (C.A. 3, 1958) 258 F.2d 70, 75 (footnote 8)

2. The Government's Argument on the Obstruction Conviction Is Manifestly Wrong.

The Government asserts, as to the obstruction conviction under 18 U.S.C., Section 1510, that because the petitioners knew that the FBI was investigating the whereabouts of the money paid to petitioners as a fee by the bank robber, Gardner, and because petitioners also knew that Gardner's new attorney, Kramer, and his former attorney, Harris, had some information about the money paid to petitioners, the petitioners must have known that Kramer and Harris, Gardner's attorneys, were going to furnish information to the FBI, and that petitioners attempted to obstruct or delay the communication of such information by misrepresentation.

Such assertion by the Government is demonstrably wrong, because even if the Government's view of the evidence is correct, the petitioners could not have had knowledge that Kramer and Harris had information that they were going to furnish to the FBI.

Thus the Government asserts that the fact that the petitioners knew that the FBI was investigating the whereabouts of the money, and also knew that Kramer and Harris had some information about it, and the fact that petitioners falsely denied having been paid the money, constitutes overwhelming circumstantial evidence that petitioners knew that Kramer and Harris had information they intended to communicate to the Government, which they attempted to obstruct by misrepresentation.

But the fact that the FBI had information that Gardner, who was then in jail, had paid the Scruggs some of the stolen money as a fee, could only mean to the Scruggs that Gardner and his attorney had already told the FBI about his payment to the Scruggs. No one else

had any knowledge of this. Since the FBI had obviously already been told about the payment to the Scruggs, Kramer and Harris had no information that had not already been communicated to the FBI.

Thus the Scruggs could not have had actual knowledge that Kramer and Harris had information they were going to furnish to the FBI, since information about the payment to the Scruggs had to have already been furnished to the FBI by the bank robber and his attorney. And the Scruggs' denial that they had received the money could not have been for the purpose of obstructing or preventing the communication of information to the FBI, since it was apparent to the Scruggs that the FBI already had that information.

Therefore, the Court of Appeals decision is contrary to its own previous decision in *United States* v. *Lippmann*, (C.A. 6, 1974) 492 F.2d 314, 317, and is contrary to the decision of the Eighth Circuit in *United States* v. *Williams*, (C.A. 8, 1973) 470 F.2d 1339, both of which held that a defendant must have knowledge that a third person has information that he is going to furnish to a Federal investigator, the communication of which the defendant attempts to obstruct or delay by misrepresentation. Even accepting the Government's view of the testimony, the proof in this case shows that petitioners had no such knowledge, and that their misrepresentation was not for the purpose of obstructing or delaying the communication of such information to the FBI.

CONCLUSION

For the reasons set forth in the petition for writ of certiorari filed herein, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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